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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COMMITTEE ON JOBS CANDIDATE ADVOCACY FUND and BUILDING OWNERS AND MANAGERS ASSOCIATION OF SAN FRANCISCO INDEPENDENT EXPENDITURE POLITICAL ACTION COMMITTEE, political action committees organized under the laws of California and of the City and County of San Francisco,

Plaintiffs,

vs.

DENNIS J. HERRERA, in his official capacity as City Attorney of the City and County of San Francisco, KAMALA D. HARRIS, in her official capacity as District Attorney of the City and County of San Francisco, the SAN FRANCISCO ETHICS COMMISSION of the City and County of San Francisco, and CITY AND COUNTY OF SAN FRANCISCO,

Defendants.

No. C-07-3199 JSW

MOTION FOR PRELIMINARY INJUNCTION

Date: September 17, 2007
Time: 1:30 p.m.
Judge: Hon. Jeffrey S. White
Courtroom: 2

Included herein:
1. Notice of Motion and Motion
2. Memo of Points and Authorities

Filed concurrently:
1. Declaration of Nathan Nayman
2. Declaration of Marc L. Intermaggio
3. Request for Judicial Notice
4. Proposed Order

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 1:30 p.m. on Monday, September 17, 2007, or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Jeffrey S. White, Judge of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, 17th Floor, Courtroom 2, Plaintiffs **COMMITTEE ON JOBS CANDIDATE ADVOCACY FUND** and **BUILDING OWNERS AND MANAGERS ASSOCIATION OF SAN FRANCISCO INDEPENDENT EXPENDITURE PAC** ("Plaintiffs") will and hereby do move the Court for a preliminary injunction enjoining Defendants Dennis J. Herrera, Kamala D. Harris, the San Francisco Ethics Commission and the City and County of San Francisco ("City"), along with all of Defendants' agents and employees, from enforcing or otherwise giving effect to sections 1.114(c)(1) and 1.114(c)(2) of the San Francisco Campaign Finance Reform Ordinance ("CFRO"), codified in the San Francisco Campaign and Governmental Conduct Code, and Regulation 1.114-2 of the Regulations to the CFRO ("CFRO Reg. 1.114-2"), to the extent that they limit contributions and expenditures by committees that make independent expenditures supporting or opposing candidates in City elections, and both therefore violate the First and Fourteenth Amendments to the Constitution of the United States. Plaintiffs further request the preliminary injunction remain in effect during the pendency of this case. This motion is based on this notice, the following memorandum of points and authorities, the declarations of Nathan Nayman and Marc L. Intermaggio, the request for judicial notice and the proposed order filed herewith, the Complaint, all papers filed and proceedings held in this case, and such other matters as the Court may consider.

ISSUES TO BE DECIDED

1. Do CFRO §§ 1.114(c)(1) and 1.114(c)(2) and CFRO Reg. 1.114-2—which limit the amount of money political committees can raise and spend on independent expenditures in City elections—violate the free speech and associational guarantees of the First and Fourteenth Amendments to the Constitution of the United States?

2. If so, should the Court preliminarily enjoin Defendants from enforcing these provisions in upcoming City elections, as Judges Ware and Jenkins have done with respect to similar restrictions imposed by the cities of San Jose and Oakland?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

San Francisco limits campaign fundraising and spending by candidates and their campaign committees; this action does not challenge those limits. San Francisco also limits political speech by groups of people who are independent of candidates and their campaign committees; this action does challenge those limits. Two judges of this Court (Judges Ware and Jenkins) have already enjoined similar ordinances in San Jose and Oakland. A third judge of this Court (Judge Wilken) enjoined San Francisco's previous (and barely different) version of this ordinance. By this motion, Plaintiffs seek similar relief here.

Plaintiffs are political committees who engage in independent speech in support of or against candidates for elective office. Plaintiffs are independent; they do not coordinate their efforts with any candidate or campaign committee. In the parlance of campaign finance law, Plaintiffs' efforts are called "independent expenditures" and those who make such expenditures are called "independent expenditure committees."

The CFRO restricts the amount of money people can give to committees like Plaintiffs and the amount of money that such committees can spend on political speech. Section 1.114(c)(1) bars anyone from giving more than $500 a year to any one committee making independent expenditures in San Francisco elections. Section 1.114(c)(2) bars anyone from giving more than an aggregate of $3,000 a year to all committees making independent expenditures. Both make it unlawful for committees to accept contributions in excess of those limits. Both, as implemented by CFRO Reg. 1.114-2, severely limit the amount of money that Plaintiffs, other committees and the people who support them can spend on independent expenditures, and therefore severely curtail political speech and the freedom of association. The ordinances and regulations have harmed and, if left intact, will continue to harm Plaintiffs' ability to make independent expenditures, particularly in the

days and weeks before the general election set for November 6, 2007.

The CFRO's restrictions prevent like-minded persons – whether they be CEOs or tradesmen, atheists or the faithful – from banding together to amplify their point of view in the political process. In San Francisco, two people, though they be independent of any candidate or campaign committee, cannot join together to spend even $1,001 to advocate the election of a candidate for office. But one wealthy person, acting independently, can spend $1,001—or a thousand times that amount—to support the same candidate. The Constitution forbids this anomaly.

This Court has consistently held that limits on independent expenditures such as those challenged here violate the First Amendment. In 1999 Judge Wilken enjoined an earlier and substantially similar ordinance. More recently, Judges Ware and Jenkins have held similar limits on independent expenditure committees unconstitutional, and have enjoined their enforcement. San Francisco's laws, which squelch political speech and impede the freedom of association, should meet the same fate. The Court should grant this motion and preliminarily enjoin Defendants from enforcing the City's independent expenditure limits.

II. STATEMENT OF FACTS.

A. The Parties.

Plaintiffs are "committees" (within the meaning of Cal. Gov't Code § 82013)[1] that make "independent expenditures" supporting or opposing candidates for political office.

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[1] Cal. Gov't Code § 82013 defines a "committee" as

> any person or combination of persons who directly or indirectly does any of the following:
>
> (a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year.
>
> (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or
>
> (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees.

Declaration of Nathan Nayman ("Nayman Decl."), filed herewith, ¶ 6; Declaration of Marc Intermaggio ("Intermaggio Decl."), filed herewith, ¶ 6. An "independent expenditure" is "an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." Cal. Gov't Code § 82031; *see also* 2 U.S.C. § 301(17). In contrast, expenditures made to or at the behest of a candidate or a campaign committee are considered campaign contributions and not independent expenditures. *See* Cal. Gov't Code § 82015.

Plaintiff **COMMITTEE ON JOBS CANDIDATE ADVOCACY FUND** ("JOBS Fund") was established as a political action committee in 1999 for the purpose of making independent expenditures to support City candidates who support economic development. Nayman Decl. ¶¶ 4-6. Committee on JOBS ("JOBS"), a California nonprofit mutual benefit corporation founded in 1991, created the JOBS Fund as part of its mission to enhance and revitalize the business conditions and environment for individuals and organizations doing business in San Francisco. *Id.* ¶¶ 2, 5.

Plaintiff **BUILDING OWNERS AND MANAGERS ASSOCIATION OF SAN FRANCISCO INDEPENDENT EXPENDITURE POLITICAL ACTION COMMITTEE** ("BOMA IE PAC") was formed as a political action committee in 1999 for the purpose of making independent expenditures to support candidates for local elective office who will promote the goals of the commercial real estate industry, the broader business community and residents of San Francisco. Intermaggio Decl. ¶¶ 4-5. BOMA IE PAC was organized by the Building Owners and Managers Association of San Francisco ("BOMA-SF"), a California nonprofit mutual benefit corporation. *Id.* ¶¶ 2, 4. The primary goal of BOMA-SF is to advance the commercial real estate industry in San Francisco, San Mateo, Marin and Sonoma Counties through advocacy, professional development and information exchange. *Id.* ¶ 2.

Defendants are City Attorney Dennis Herrera, District Attorney Kamala Harris, the

San Francisco Ethics Commission and the City and County of San Francisco. The individuals and the Ethics Commission are named as defendants because the CFRO gives them the job of enforcing the limits challenged by this lawsuit. CFRO §§ 1.104(g), 1.164, 1.168.[2]

B. San Francisco's Limits on Independent Expenditures.

Plaintiffs challenge Sections 1.114(c)(1) and 1.114(c)(2) of the Ordinance (collectively, "Section 1.114(c)"), which restrict contributions to independent expenditure committees:

> (c) LIMITS ON CONTRIBUTIONS TO COMMITTEES.
>
> (1) Per Committee Limit. No person shall make, and no committee treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person to the committee to exceed $500 per calendar year.
>
> (2) Overall Limit. No person shall make, and no committee treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person to all committees to exceed $3,000 per calendar year.
>
> (3) Definitions. For purposes of this Subsection, "committee" shall mean any committee making expenditures to support or oppose a candidate, but shall not include candidates' campaign committees.

CFRO § 1.114(c). Thus, a person can contribute no more than $500 a year to a committee for the purpose of making independent expenditures in support of or opposition to all the candidates running for City office — no matter how many offices are on the ballot or how many candidates are competing for those offices. *Id.* § 1.114(c)(1). A person also cannot give more than $3,000 in the aggregate to all independent expenditure committees per calendar year. *Id.* § 1.114(c)(2). In other words, if a person contributes the maximum allowable amount of $500 to committees making independent expenditures, he or she can give to no more than six committees.

CFRO Reg. 1.114-2 closes the loop by permitting independent expenditures only if they are funded by contributions that abide by these limits:

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[2] The CFRO is codified in the San Francisco Campaign and Governmental Conduct Code and is set forth in full as an attachment to the Complaint and as Exhibit C to Plaintiffs' Request for Judicial Notice ("RFJN"), filed herewith.

> (2) Exception. A committee may solicit and accept contributions in excess of the limits established by section 1.114(c) if the committee makes expenditures for any lawful purpose other than supporting or opposing candidates for City elective office, provided that funds received from contributions in excess of the limits set forth in section 1.114(c) are used only for lawful purposes other than supporting or opposing candidates for City elective office.

CFRO Reg. 1.114-2(a)(2) (the Regulations are set forth in full as Exhibit B to the RFJN). In other words, a person can give and a committee can receive contributions that exceed the limits set forth in Section 1.114(c), but the committee is expressly forbidden from using amounts in excess of the limits to fund independent expenditures.

C. The Prior Limits Enjoined as Unconstitutional.

On September 8, 1999, Judge Wilken enjoined the City from enforcing a similar ordinance that limited contributions to independent expenditure committees. At the time, Section 16.508(b) of the San Francisco Administrative Code provided that

> For candidates who adopt the expenditure ceilings [of this] Chapter, no person other than a candidate shall make, and no campaign treasurer shall accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or opposition to such candidate, *including contributions to political committees supporting or opposing such candidate*, to exceed $500.

San Franciscans for Sensible Government v. Renne, No. C-99-02456-CW (N.D. Cal. 1999) (emphasis added), RFJN Ex. H, at 3. The City Attorney had interpreted section 16.508(b) to bar individuals from contributing more than $500 in the aggregate to a candidate's campaign and to committees making independent expenditures to support that particular candidate. *Id*. at 5-8. The District Attorney dissented from the City Attorney's position, stating that "'attempting to control independent committee expenditures (by improperly controlling contributions) [is] contrary to the mandates of [*Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480 (1985)].'" *Id*. at 6-7; *see also id.* at 8.

A non-profit corporation, its political committee and an individual contributor to the committee filed suit in this Court and moved for a preliminary injunction against the City's contribution limits as they applied to committees making independent expenditures. Observing that "the Supreme Court has indicated that making contributions to PACs and

political parties, which make only independent expenditures and neither make contributions to, nor coordinate their expenditures with, candidates or candidate-controlled committees, is highly protected speech and may not be regulated," Judge Wilken granted the motion. *Id.* at 13 & n. 2 (citing *California Medical Association v. FEC*, 453 U.S. 182, 197-99 (1981) (plurality opinion); *id.* at 202-03 (Blackmun, J., concurring); and *Federal Election Comm'n v. National Conservative PAC*, 470 U.S. 480, 497-98 (1985)). Finding that the City's restrictions imposed just such a regulation, Judge Wilken enjoined the City

> from enforcing § 16.508 of the Ordinance *to the extent that it limits the amount that an individual or entity may contribute to independent political action committees that have made and will make only independent expenditures in support of or in opposition to a candidate* and that neither make direct contributions to a candidate or candidate-controlled committee nor coordinate their expenditures with a candidate or candidate-controlled committee.

Id. at 16 (emphasis added). The Ninth Circuit affirmed. *San Franciscans for Sensible Government v. Renne*, No. 99-16995 (9th Cir. Oct. 20, 1999) (attached as Ex. I to the RFJN). The parties thereafter settled the case, with the City agreeing not to enforce the limits the Court had enjoined. RFJN Ex. J, at 9 (stipulated judgment).

Undeterred, the next year Defendant San Francisco Ethics Commission promoted a ballot measure (Proposition O) containing restrictions on independent expenditure committees similar to those enjoined in *SFSG*. RFJN Ex. A (2000 San Francisco ballot pamphlet, Proposition O and arguments for and against). Proposition O was approved in the 2000 election and it took effect at the beginning of 2001. RFJN Ex. C. The measure became part of the Ordinance at issue in this litigation, including the independent expenditure contribution limits now set forth in Section 1.114(c).

D. The Impact of Section 1.114(c) on Plaintiffs.

The limits set by Section 1.114(c) severely restrict Plaintiffs' ability to communicate their political messages to San Francisco voters. Nayman Decl. ¶¶ 13-20; Intermaggio Decl. ¶¶ 15-19. If Plaintiffs were not constrained by the $500 and $3,000 aggregate limits, they would be able to, and would, raise and spend more money communicating their political messages more effectively and to more voters. Nayman Decl. ¶¶ 13-20;

Intermaggio Decl. ¶¶ 15-19.

Between the *Renne* decision and the time Proposition O took effect, San Francisco did not impose any limits on contributions to JOBS Fund. JOBS Fund received $170,284 from JOBS's members in calendar year 1999, and $785,000 in calendar year 2000. Nayman Decl. ¶ 15. Beginning with calendar year 2001, JOBS Fund has received an average of only $4,208 per calendar year. *Id.* In 2004, JOBS Fund made an independent expenditure of $9,000 to oppose the candidacy of a supervisor. *Id.* ¶ 16. Because of the City's limits, it was extremely difficult to raise the money to pay for that expenditure. *Id.*

In 2006, JOBS's members considered making independent expenditures to oppose certain political candidates, but decided that Section 1.114(c)'s limits would prevent them from having any impact on voters. *Id.* ¶ 17. Because Section 1.114(c) has made it so difficult to advocate effectively in support of or in opposition to candidates, JOBS's members have largely re-channeled their efforts into ballot initiatives, as San Francisco cannot impose limits on contributions for or against ballot initiatives. *Id.* ¶¶ 19-23. (Thus, perhaps unwittingly, San Francisco encourages people to seek political change through ballot initiatives rather than through their elected representatives.)

BOMA IE PAC also has lacked money for independent expenditures as a result of Section 1.114(c). Intermaggio Decl. ¶¶ 15-17. Although the IE PAC has raised some money from BOMA-SF's members for independent expenditures, if Section 1.114(c) were not in place, the IE PAC could have communicated its views on candidates for City office far more often and far more effectively. *Id*. As with JOBS, Section 1.114(c) has forced BOMA-SF's members to devote most of their attention to ballot initiatives. *Id*. ¶¶ 18-22.

On November 6, 2007, the City will hold elections for the offices of Mayor, District Attorney and Sheriff. Plaintiffs wish to make various independent expenditures to support or oppose candidates in the 2007 election, as they have done in past San Francisco elections, but the Ordinance will restrict their ability to do so. Nayman Decl. ¶¶ 12-13, 16, 24; Intermaggio Decl. ¶¶ 13-15, 23. Plaintiffs are currently attempting to chart a course of action for making independent expenditures for the election, but the restrictions imposed by

Section 1.114(c) are substantially impeding their ability to do so. Nayman Decl. ¶ 24; Intermaggio Decl. ¶ 23. Members' contributions to the JOBS Fund and BOMA IE PAC would have been greater this year (and in years past) but for the limits imposed by Section 1.114(c) of the Ordinance. Nayman Decl. ¶¶ 14-15, 17; Intermaggio Decl. ¶¶ 16. Thus, Section 1.114(c) restricts and will continue to restrict Plaintiffs' ability to make independent expenditures in support of or in opposition to San Francisco candidates. Nayman Decl. ¶¶ 10-20; Intermaggio Decl. ¶¶ 10-19.

III. ARGUMENT.

A. Standard of Review for a Preliminary Injunction.

A party seeking a preliminary injunction must show "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991) (internal quotes omitted). These are not separate tests, but the "outer reaches of a single continuum." *Benda v. Grand Lodge of International Ass'n of Machinists & Aerospace Workers*, 584 F. 2d 308, 315 (9th Cir. 1978). "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). The impact on the public interest is also a factor to consider when balancing the hardship to the parties. *Id.*

Plaintiffs meet all of these requirements and are accordingly entitled to a preliminary injunction against Defendants' enforcement of Section 1.114(c).

B. Plaintiffs Are Likely to Succeed on the Merits and Will Suffer Irreparable Injury if an Injunction Does Not Issue.

1. Plaintiffs are likely to succeed on the merits.

As Judge Wilken decided with respect to the predecessor to Section 1.114(c), Plaintiffs are likely to succeed on the merits of their challenge because the limits on

independent expenditure committees set forth in Section 1.114(c) violate Plaintiffs' First Amendment rights.

a. Because Section 1.114(c) limits independent expenditures, it is subject to strict scrutiny under the First Amendment.

Limits on independent expenditure committees trigger strict scrutiny — the most exacting form of judicial review required by the Constitution.

In *Buckley v. Valeo*, 424 U.S. 1, 20 (1976), the Supreme Court's seminal decision regarding the constitutionality of campaign finance regulation, the Court drew a distinction between limits on expenditures by candidates and political committees, which are subject to strict scrutiny, and limits on contributions to committees affiliated with candidates, which are subject to a more relaxed form of judicial scrutiny. Limits on expenditures require strict scrutiny because

> restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduce[s] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19.

At first blush, *Buckley* would seem to draw a bright line between limits on expenditures (subject to strict scrutiny) and limits on contributions (subject to lesser scrutiny). But courts have not always observed that bright line — particularly, where, as here, a limit on contributions restrains expenditures. Thus, the Supreme Court struck down Berkeley's limit on contributions to committees making expenditures to support or oppose ballot measures, reasoning:

> [A]n individual may make expenditures without limit under [the challenged ordinance] but may not contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint

> on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot initiative.

Citizens for Rent Control v. Berkeley, 454 U.S. 290, 299 (1981); *see also id.* at 299-300 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

Lincoln Club v. City of Irvine, 292 F.3d 934, 938 (9th Cir. 2002) is the controlling Ninth Circuit authority dealing with limits on contributions to committees who make independent expenditures to support or oppose candidates for office. *Lincoln Club* stands for the proposition that such limits must be subjected to strict scrutiny. In that case, the City of Irvine's ordinance prohibited any person, including any political committee, who "makes any independent expenditure during an election cycle in support of or opposition to any City candidate," from accepting during the same election cycle any contribution from any person that exceeded $320. *Id.* at 938 (quoting Section 1-2-404(B) of Irvine's Campaign Financing Law). The practical effect of Irvine's ordinance was to bar the Lincoln Club from making any independent expenditures, because club dues exceeded the statutory limit. *Id.* Such contribution limits, the court noted, constituted an expenditure limit and triggered strict scrutiny because they "place a substantial burden on protected speech (*i.e.*, barring expenditures) . . . ." *Id.* at 939.

In applying strict scrutiny, the *Lincoln Club* court distinguished *Buckley* (which dealt with contribution limits to candidates, not independent expenditure committees), noting that "[n]early all of the Supreme Court and Ninth Circuit cases that have considered the constitutionality of contribution limitations, however, have done so in the context of *contributions to candidates* . . . ." *Id.* at 937 (emphasis in original). The court concluded that cases dealing with limits on contributions to candidates did not provide the proper level of scrutiny for "an Ordinance that acts as both an expenditure and a contribution limitation." *Id.*

Judges Ware and Jenkins also applied strict scrutiny in striking down limits on independent expenditure committees analogous to those at issue here. In *San Jose Silicon*

Valley Chamber of Commerce PAC v. City of San Jose, No. C 06-04252-JW, 2006 WL 3832794 (N.D. Cal. Sept. 20, 2006) ("*COMPAC*"), Judge Ware considered the constitutionality of a San Jose ordinance that prevented any person from making or receiving "any contribution to or on behalf of an independent committee expending funds or making contributions in aid of and/or opposition to the nomination or election of candidates for city council or mayor which will cause the total amount contributed by such person to exceed [$250] per election." *Id.* at *2. The ordinance also required that independent committees segregate contributions received or expenditures made for the purpose of influencing such elections from all other contributions or expenditures. *Id.* The ordinance permitted contributions to committees in excess of the $250 limit, "so long as no portion of the contribution in excess [thereof] is used to influence San Jose council or mayoral elections." *Id.* The court held that San Jose's ordinance thus "serve[d] as a content-based expenditure limit — independent committees may spend only $250 per donor, if they are spending to aid or oppose a candidate for San Jose municipal office." *Id.* at *5. As such, the "appropriate level of constitutional review is strict scrutiny: the restriction must be narrowly tailored to serve an overriding state interest." *Id.* at *6.[3]

In *OakPAC v. City of Oakland*, No. 06-CV-06366-MJJ (N.D. Cal. Oct. 19, 2006), Judge Jenkins considered the constitutionality of an Oakland ordinance that prohibited any person or political committee "that makes independent expenditures supporting or opposing a candidate" from accepting "any contribution for the purpose of influencing elections for city office in excess of" $250 or $100, depending on whether the recipient constituted a "broad-based political committee" or not.[4] The ordinance permitted contributions to such

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[3] The *COMPAC* defendants have appealed the preliminary injunction order. *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, USCA No. 06-17001 (9th Cir. Oct. 25, 2006) (docketing appeal). The briefs in the appeal are fully submitted; the Ninth Circuit has not yet scheduled oral argument.

[4] A copy of Judge Jenkins' Temporary Restraining Order ("TRO," Dkt. 21 in 06-CV-06366)) is attached as Exhibit E to Plaintiffs' RFJN. The TRO does not quote the relevant sections of the ordinance (Oak. Mun. Code §§ 3.12.050 & 3.12.060), but they are set forth as Exhibit D to the RFJN.

persons or committees exceeding the prescribed limits, "so long as no portion of the contribution in excess of the [limits] is used to influence elections for city office." Oak. Mun. Code §§ 3.12.050(E); 3.12.060(E).

In considering the plaintiffs' request for a TRO, Judge Jenkins noted that Oakland's "limits on contributions to independent political committees are triggered only by the content of the speech conducted by the committee, *i.e.*, speech expressly advocating the election or defeat of a candidate." RFJN Ex. E, at 2. The Court reasoned that "[b]y limiting the source of funds available for political committees to conduct independent expenditures, [the] challenged provisions act as both a limit on contributions to the committee *and as a limit on its expenditures*." *Id.* (citing *Lincoln Club*, 292 F.3d at 939) (emphasis in original). Noting that "in such instances, courts apply strict scrutiny to assess the constitutionality of the regulation," the Court went on to enter the TRO. *Id.* at 3 (citing *Lincoln Club*, 292 F.3d at 937-39).[5]

Section 1.114(c) operates in the same manner as the limits enjoined by *Lincoln Club*, *COMPAC* and *OakPAC*. It dramatically limits the money that Plaintiffs can raise to fund independent speech, diminishing their political voice in City elections. Because Section 1.114(c) "limit[s] the source of funds available for [Plaintiffs] to conduct independent expenditures," it limits the "quantity of expression" that Plaintiffs may engage in and must accordingly be subjected to strict scrutiny. *OakPAC*, RFJN Ex. E, at 2-3; *Buckley*, 424 U.S. at 21; *see also Lincoln Club*, 292 F.3d at 939; *COMPAC*, 2006 WL 3832794, at *6.

Defendants may argue that Section 1.114(c) differs from the limits at issue in *COMPAC* and *OakPAC* on the theory that Section 1.114(c) only limits contributions to committees making independent expenditures, not the expenditures themselves. This is a distinction without a difference. The net effect of all three ordinances is the same: each

[5] After the court issued the TRO, it issued a stipulated order staying the case pending the outcome of the appeal of the *COMPAC* litigation. *See OakPAC*, Stipulated Stay Order, Dkt. 32 (Dec. 18, 2006), attached as Exhibit F to the RFJN.

constrains how much money committees can spend on independent expenditures. Section 1.114(c) cuts off the source of the expenditures, namely, the members' contributions that pay for them. The ordinances at issue in *Lincoln Club* and *SFSG* were precisely the same in this respect — and were still subjected to strict scrutiny and found unconstitutional.

Here, CFRO Reg. 1.114-2 eliminates any doubt about whether San Francisco's law reaches expenditures. It provides that a person can give — and a committee can receive — contributions that exceed the limits set forth in Section 1.114(c), but the committee cannot use any amounts in excess of the limits to fund independent expenditures. As implemented, Section 1.114(c) is therefore no different than the limits at issue in *COMPAC* and *OakPAC*, and is a direct restraint on independent expenditures by political committees. Accordingly, Section 1.114(c) must be subjected to strict scrutiny.

b. Section 1.114(c) does not serve a compelling government interest.

An ordinance subject to strict scrutiny can pass muster only if it serves a compelling governmental interest and is narrowly tailored to serve that interest. *ACLU v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004); *COMPAC*, 2006 WL 3832794, at *6. Section 1.114(c) does not serve a compelling government interest. In fact, it is unclear what purpose Section 1.114(c) is supposed to serve. Section 1.100(b) of the Ordinance lists eleven purposes for the Ordinance as a whole, but does not state which apply to Section 1.114(c) — only one of the eleven refers to independent expenditures (number 7).[6]

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[6] The "Proponent's Argument" that Defendant Ethics Commission published in the ballot pamphlet in favor of Proposition O (which when passed in 2000 became the Ordinance), does little to illuminate the purpose of the limits now codified in Section 1.114(c). It stated:

> Currently, there is no limit on contributions to independent committees. *To reduce the influence of large contributions on elected officials*, the Ethics Commission proposes a limit of $500 on the amount a person or entity may contribute to each independent committee and an overall limit of $3,000 per year on the amount a donor may contribute to all such committees. . . .

(continued…)

Regardless, none of the purposes listed in Section 1.100(b) constitutes a compelling government interest for limiting contributions to independent expenditure committees. Of the eleven purposes, only these might arguably pertain to Section 1.114(c):

> . . . .
>
> (2) Ensure that all individuals and interest groups in our city have a fair opportunity to participate in elective and governmental processes;
>
> (3) Create an incentive to limit overall expenditures in campaigns, thereby reducing the pressure on candidates to raise large campaign war chests for defensive purposes beyond the amount necessary to communicate reasonably with voters;
>
> (4) Reduce the advantage of incumbents and thus encourage competition for elective office;
>
> . . . .
>
> (6) Ensure that serious candidates are able to raise enough money to communicate their views and positions adequately to the public, thereby promoting public discussion of the important issues involved in political campaigns;
>
> (7) Limit contributions to candidates and committees, *including committees that make independent expenditures*, to eliminate or reduce the appearance or reality that large contributors may exert undue influence over elected officials . . . .

CFRO § 1.100(b) (emphasis added).

Purpose (7)—the only one that actually mentions independent expenditures—indicates that the Ordinance aims to prevent corruption or the appearance thereof. But this goal is not served by limits on contributions to independent political committees. In *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 501 (1985) ("*NCPAC*"), the Supreme Court emphatically rejected the notion that independent expenditures by political committees can be linked to any candidate corruption or the appearance of candidate corruption. Preventing corruption and the appearance of corruption only justifies the regulation of campaign activity *coordinated with candidates*, not the *independent* activities of political committees, because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate and thereby alleviates the danger that expenditures will be

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(…continued)

See RFJN Ex. A, at P-212 (November 7, 2000 ballot, Proposition O and arguments for and against) (emphasis added).

given as a *quid pro quo* for improper commitments from the candidate." *NCPAC*, 470 U.S. at 497-98; *see also California Medical Association*, 453 U.S. at 203 ("In contrast, contributions to a committee that makes only independent expenditures pose no such threat [of corruption].") (Blackmun, J., concurring); *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994) ("And the concern of a political *quid pro quo*, for large contributions, which becomes a possibility when the contribution is to an individual candidate . . . is not present when the contribution is given to a political committee or fund that by itself does not have legislative power."); *OakPAC*, RFJN Ex. E, at 3 ("[B]ecause independent expenditures must be conducted without the input or knowledge of the benefiting candidate, the Court finds no basis in the record before it to support limits on contributions to independent expenditure committees under the anti-corruption rationale.").[7]

The risk of corruption is particularly slight when the contribution to fund an independent expenditure is made through a political committee. As the Supreme Court has stated, "[i]f anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor." *Colorado Republican Fed. Camp. Cmte. v. Federal Election Comm'n*, 518 U.S. 604, 617 (1996) (plurality op.). Section 1.114(c) does not serve a compelling government interest.[8]

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[7] Indeed, *Buckley* upheld limits on contributions to candidates under the Federal Election Campaign Act of 1971 only to counter the possibility that "large contributions are given to secure a political quid pro quo from current and potential officeholders." *Buckley*, 424 U.S. at 26; *see also Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (11th Cir. 1980) ("The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate.").

[8] Purposes (2), (3), (4) and (6) seek to limit both contributions and expenditures – political speech – by some citizens in an attempt to improve the ability of other individuals, interest groups, and candidates to communicate with the electorate. But playing favorites among these speakers is not a legitimate government interest, much less a compelling one. Indeed, the Supreme Court rejected this rationale thirty years ago in *Buckley:*

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign

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c. The City's ordinance is not narrowly tailored to serve any compelling government interest, to the extent one is discernible.

Even if Section 1.114(c) did serve a compelling government interest, it would still fail the First Amendment's strict scrutiny analysis because it is not narrowly tailored. As the Supreme Court has warned, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986). Section 1.114(c) unduly burdens the freedoms of both speech and association[9] of Plaintiffs and individuals who wish to make independent expenditures to express political viewpoints.

While Section 1.114(c) rightly places no limits on the amount an individual can spend on candidate advocacy from his or her own funds (*see Buckley*, 424 U.S. at 39-55), it bars individuals from pooling their money and spending more than $500 apiece supporting or opposing a City candidate, and prevents individuals who have already given $500 to support independent expenditures to six other committees from spending any money to support independent expenditures by a seventh committee. Whereas a wealthy individual could pay for a $25,000 full-page advertisement in the *San Francisco Chronicle* urging readers to vote for a particular candidate, 25 individuals could not each contribute $1,000 for the same ad. The result is that the ordinance actually favors the political speech of wealthy individuals over those of more modest means. Like-minded persons who wish to

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> to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people." The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley, 424 U.S. at 48-49 (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1966); *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

[9] The constitutional analysis of the rights to free speech and association is a blended one. As the Supreme Court has described, "[a] limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend." *Citizens for Rent Control*, 454 U.S. at 300.

join together to amplify their viewpoints are silenced in the political process. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").[10]

NCPAC shows that the Ordinance is not narrowly tailored. In that case, the Court considered a federal law that proscribed independent expenditure committees from spending more than $1,000 to "further" the election of a Presidential candidate who accepted public financing. 470 U.S. at 482. In striking down the law, the Supreme Court held that even if $1,000 expenditures posed a risk of corruption, which the Court held they did not, the limit would still be "fatally overbroad," *id*. at 498, amounting to a "wholesale restriction of clearly protected conduct." *Id*. at 501. The Court noted that the restriction was not limited to "multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." *Id*. at 501, 498; *see also COMPAC*, 2006 WL 3832794, at *6.

Section 1.114(c) is similarly overbroad. As with the restrictions in *NCPAC*, San Francisco's limits apply to committees large and small — under California law, a political committee need only make independent expenditures of $1,000 or more in a calendar year, *see supra* at n.1, so the limits apply to nearly any group that wants to have a voice in an election. And the limits apply to committees making any sort of expenditure that "supports

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[10] To the extent Defendants should argue that committees such as Plaintiffs are somehow entitled to less constitutional protection in trying to express the viewpoints of their contributors than the individual contributors might be themselves, the Supreme Court has squarely rejected such a notion. As the Court noted in *NCPAC*:

> We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents."

NCPAC, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22) (alteration in original).

or opposes" a candidate for City office. Even if Section 1.114(c) did serve a compelling interest — and it doesn't — it is not narrowly tailored to serve that interest.

2. Plaintiffs face irreparable harm unless the Court issues a preliminary injunction.

Without the preliminary injunction sought in this Motion, Plaintiffs will suffer irreparable injury, the second criterion under the first test for the issuance of a preliminary injunction.

The standard for establishing irreparable injury when First Amendment freedoms are at stake is low. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002); *S.O.C., Inc. v. County of Clark*, 1522 F.3d 1136, 1148 (9th Cir. 1998); *Brown v. Cal. Dept. of Transportation*, 260 F. Supp. 2d 959, 968 (N.D. Cal. 2003); *OakPAC*, RFJN Ex. E, at 4.

As discussed, the City's unconstitutional limits impose, and have imposed, a heavy burden on Plaintiffs' ability to make independent expenditures. *See supra* at 7-9. Plaintiffs have been forced to re-channel most of their efforts into ballot initiatives that promote the interests they support. *See supra* at 8. Unless and until Section 1.114(c) is enjoined, those who would like to contribute more than $500 to support the message that Plaintiffs could otherwise communicate in this year's election cannot do so. And if an individual has already given, or plans to give, $3,000 to other committees making independent expenditures, that person will be completely prevented from contributing to Plaintiffs or other committees whose message that person might also like to support in the election. Ignoring Section 1.114(c) could result in six months in jail, $5,000 in criminal fines, and three times the amount received in excess of the limits in civil and administrative fines, for each violation. *See* CFRO § 1.170. These facts more than establish the "possibility of irreparable injury" if the Court does not enjoin Defendants from enforcing Section 1.114(c). *Rent-A-Center*, 944 F.2d at 602 (9th Cir. 1991).

C. Plaintiffs Have Raised Serious Questions Regarding the Validity of Section 1.114(c) and the Balance of Hardships Tips Heavily in Their Favor.

Under the alternate test for injunctive relief, a party must demonstrate that serious questions of law have been raised that are "substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). For reasons outlined above, Plaintiffs' constitutional challenge to the City's ordinance easily meets this standard. Indeed, as described, the Ninth Circuit and this Court have consistently struck down limitations analogous to those challenged here. The questions raised by Plaintiffs' claims are serious and the answer to them is clear: Section 1.114(c) is unconstitutional.

The balance of hardships and public interest also militate in favor of the relief sought by Plaintiffs. *See OakPAC*, RFJN Ex. E, at 4. As noted above, the deprivation of First Amendment rights, even for a short period of time, constitutes an irreparable injury under controlling court decisions. In contrast, the City faces no comparable harm resulting from an injunction. Its generalized interest in enforcing its laws cannot count for much when the law in question is constitutionally suspect. To the extent Defendants would argue that Section 1.114(c) prevents corruption in the City's elected officials, that interest is inapplicable here, for the reasons identified above. An injunction would actually be a boon to the City's interests, in that its citizens will be freer to exercise their core First Amendment rights to speak and associate with one another. Political debate would be more robust. The result would be democracy, not hardship.

D. The Court Should Waive Any Bond Requirement for Plaintiffs.

Under Rule 65(c) of the Federal Rules of Civil Procedure, parties seeking preliminary injunctive relief are required to post a bond with the court, "in such sum as the court deems proper." "In non-commercial cases, however, courts should consider the hardship a bond requirement would impose on the party seeking the injunction in addition to the expenses the enjoined party may incur as a result of the injunction." *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997). The Court may waive the

bond requirement completely when "the balance of equities weighs overwhelmingly in favor of the party seeking the injunction." *Id.* Judge Jenkins did exactly that with respect to OakPAC. *OakPAC*, RFJN Ex. E, at 4.

This is, of course, a constitutional, not a commercial, case. Issuing the requested preliminary injunction will not risk any added expense for Defendants. Conversely, the financial hardship that Plaintiffs would suffer should the Court require them to post a bond would be severe. Posting a bond would leave Plaintiffs with even fewer resources to make expenditures to support or oppose candidates in this year's election, thereby curbing political speech. As such, Plaintiffs ask that the Court exercise its discretion and waive the requirement of a bond.

IV. CONCLUSION.

For the foregoing reasons, the Court should grant Plaintiffs' Motion, and enjoin Defendants from enforcing Sections 1.114(c)(1) and 1.114(c)(2) of the San Francisco Campaign Finance Reform Ordinance. The Court should also exercise its discretion and waive the bond requirement of Fed. R. Civ. P. 65(c).

Dated: August 10, 2007.

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